
(1993) 07 AP CK 0029

In the Andhra Pradesh High Court

Case No : C.C.C. Appeal No. 51 of 1984

P. Rajulu Goud and others

APPELLANT

Vs

P. Jeevan Kumar and others

RESPONDENT

Date of Decision : 21-07-1993

Acts Referred:

Hindu Succession Act, 1956 — Section 6, 8

Citation : AIR 1994 AP 152 : (1994) 1 ALT 508 : (1994) 1 APLJ 338

Hon'ble Judges : P. Venkatarama Reddi, J

Bench : Single Bench

Advocate : C. Poornaiah, for the Appellant;

Judgement

1. This appeal arises out of a partition suit filed by respondents 1 to 4 herein against the appellants. The 4th plaintiff (R4 in the appeal) is the mother of plaintiffs 1 to 3 (R1 to R3) who are minor sons. The 1st appellant (D1 in the suit) is the father of plaintiffs 1 to 3 and husband of 4th plaintiff. The 2nd appellant (D2 in the suit) is the mother of the 1st appellant. The other two appellants are the brothers of the 1st appellant and they are D3 and D4 in the suit. The suit is for partition of the properties in plaint A, B and C schedules. "A" schedule is a house constructed with the site purchased by the father of D-1 late Sri Sattaiah Goud and in which he and his sons' families were living till his death in 1976. In that, the plaintiffs-respondents claimed 4/5th share out of 1/4th share held by the 1st defendant. "B" schedule is also a house. It was constructed by the 1st defendant. The plaintiffs have claimed 4/5th share therein. "C" schedule is the business of the "Kirana Stores" being run by the 1st defendant. In the "C" schedule also, 4/5th share is claimed. 4th plaintiff is also claiming a share in the alleged joint family properties in view of the fact that she is entitled to the share of the pre-deceased son. The learned Additional Chief Judge, City Civil Court, Hyderabad passed a preliminary decree declaring that the plaintiffs are entitled to 4/5th share in "B" and "C" schedule properties and business. As far as "A" schedule is concerned, the decree is in two parts: (i) that the plaintiffs are

entitled to get 4/ 5th share out of 1 / 4th share of the 1st defendant in the "A" schedule property and (ii) that the plaintiffs are also entitled to get in addition to the above, 4/5th share out of 1 /6th share of the 1st defendant which he inherited from his father. At this stage, it may be clarified that the reason for declaring only 1/6th share of the 1st defendant which he is entitled by way of inheritance from the father is that the father left behind leaving four sons and two daughters (not parties herein). A preliminary decree was passed accordingly.

2. It is unfortunate that no one has appeared for the respondents. Though Sri Narendar Kumar, advocate has filed vakalat after obtaining the consent from the previous advocate Sri G. V. R. Mohan Rao, the Counsel has not appeared. Even after the appeal was partly heard, the same was adjourned to the next day in the hope that there will be representation on behalf of the respondents. As no one turned up, I posted the case for judgment and the delivery of judgment was postponed by one day again in the hope that the respondents' Counsel will be present. As the respondents and their Counsel have been continuously absent, I have no option but to dispose of the old appeal after hearing the arguments of the learned counsel for the appellant. I must say that the learned Counsel for the appellant, Ms. C. Poornaiah and V.L.N.G.K. Murthy presented and argued the case in a spirit of assisting the Court and placed all the aspects pro and contra to the appellant's case. I have also carefully gone through the pleadings and evidence.

It is unfortunate that the pleadings and the judgment are quite unsatisfactory in this case.

3. The issue framed in the suit is whether the plaintiffs are entitled to partition of the plaint schedule properties and the same was answered in favour of the plaintiffs. The relief as mentioned above was granted.

4. The plaintiffs have to establish that the family consisting of D1's father, D1 and the other brothers was possessed of sufficient nucleus of ancestral properties from which the properties in question would have been acquired or that the joint family funds were actually invested or spent in the acquisition of the plaint-schedule property. The question is how far the plaintiffs-respondents have established the same.

5. As far as the "A" schedule house is concerned, the plaint case is that late Satteyya Goud did diary, arrack and money-lending business. "He retained "A" schedule house which was his residence as joint family property". The plaintiffs also averred "D1, D3 and D4 assisted their father in his business while doing their independent business". In the written statement of the defendants, it is denied that Satteyya Goud did arrack business and money-lending business. According to the defendants, he was having only two she-buffaloes and the income derived therefrom was barely sufficient to meet the family expenditure. "A" schedule house was "purchased" by their father and it was developed subsequently with the funds and earnings contributed by D1, D3 and D4. Their father was not

having any business of his own except the milk-vending. It was also contended that the "A" schedule house was left over by their father for the maintenance of the 2nd defendant with an understanding that the income from the house should not be touched by the sons or daughters. The plaintiff who examined herself as P.W. 1, admitted that her father-in-law (Satteyya Goud) did not get any ancestral property "from his father's source". She stated that her father-in-law was carrying on milk business. Though in the chief-examination, she stated that he was doing money-lending and arrack business as well, in the cross-examination, she only mentioned about the milk business. With regard to toddy business, she stated that a toddy shop was started two years after her marriage i.e., in 1969 or so. She also stated that the money-lending business was started after her marriage. P.W. 1 further stated that after purchasing the plot, her father-in-law constructed the A-schedule house and he was residing with all the family members therein. Curiously she stated that till the death of her father-in-law, he was the owner of the house and the said house was the self-acquired property of her family "only. P.W. 2 who was aged about 85 years gave evidence stating that late Satteyya Goud did milk business and he was also doing cultivation by taking lands on lease. In the cross-examination he stated that the extent of land taken for lease was about Ac.20-00 with two wells and the land was near Kavadiguda area. However, he could not give details regarding the income from the lands. He also stated that Satteyya used to vend toddy at his house. P.W. 3, another resident of the locality, also spoke to the fact that -Satteyya was originally doing milk business and later took agricultural lands on lease and -he purchased the house out of the said income. Coming to the evidence of D.W. 1 (1st defendant), he affirmed the fact that his father did not have any ancestral property nor did he inherit any property from his father. He stated that his father was doing milk business by maintaining four she-buffaloes, He deposed to the fact that his father also took agricultural lands on lease. He denied that his father was doing money-lending or arrack business. He stated that his two other brothers carried on arrack business on their own. He could not say whether his brothers assisted his father in cultivation or dairy business. With regard to the house, D.W. 1 stated that his father purchased the plot in the year 1953 by means of a registered sale-deed , dated 23-11-1953. A certified copy of the sale deed is filed as Ex.BI. He further stated that his father constructed the house in bits and the construction was going on till 1974 i.e., two years before the death of his father. He asserted that the house was his father's self-acquired property, but he did not explain the sources for investment in the house. D.W. 1 further stated that all the family members were residing in the house, and a portion of it was let out to the tenants. The witness says that he was born in 1947.

6. From the above evidence, it is not possible to conclude that the site which was purchased in the year 1953 by late Satteyya Goud can be regarded as the joint family property. There is no evidence whatsoever to show that the family had any nucleus of ancestral properties which could have formed the basis for subsequent acquisitions. On the other hand, the evidence of P.W. 1 herself his

that late Satteyya Goud did not get any ancestral property from his father. It is not even stated by P.W. 1 or the other witnesses examined on her behalf that the four she-buffaloes which Sri Satteyya was maintaining were got from the ancestors on partition or survivorship. The possibility of Satteyya himself acquiring the she-buffaloes by his own labour and exertion cannot be ruled out. Before 1953 (when the site was purchased) it cannot be said that his sons who were young boys have assisted him either in the maintenance of cattle or milk-vending or in agricultural operations. In this State of affairs, the irresistible conclusion that should be drawn is that the site purchased by late Satteyya Goud is not a property purchased by utilising the joint family funds but it is his self-acquired property. P.W. 1 in a way admits this fact in her cross-examination.

7. The next aspect to be considered is about the house built on the site. Though it is stated by DI in the written statement that the house was purchased, in his deposition, it is made clear that Satteyya purchased the site and later constructed the house gradually. P.W. 1 also accepts the fact that the site was purchased by her father-in-law and the house constructed thereon.

8. Notwithstanding the defective pleadings and scanty evidence regarding the utilisation of joint family funds for the purpose of construction of "A" schedule house, a reasonable inference could be drawn from the proved facts and circumstances that the father would have taken the assistance of the grown-up sons at least D3 and D4 if not DI, in the maintenance of buffaloes and in agricultural operations. The income therefrom derived on account of joint exertions would have naturally been pooled for the purpose of construction of the house to accommodate all the joint family members. No doubt, there is an admission of P.W. 1 that the house property was the self-acquired property of her father-in-law. However, in the context it should be construed that P.W. 1 was only referring to the site which was purchased by her father-in-law but not to the house. The learned Counsel for the appellants after taking instructions from his client in the Court has fairly conceded this position and I need not dilate further on this aspect. It must be held therefore that the site on which "A" schedule house stands is not the joint family property but the house must be so regarded. As long back as in 1927, a Division Bench of the Madras High Court in A.L.P.R. Periakaruppan Chetti Vs. R.M.P.R. Arunachalam Chetti and Another, had taken the view that by building a superstructure with self-acquired funds on the ancestral site, the house does not become joint family property. It was also pointed out that the fact that a house is built by one member of a joint family on joint family land cannot be regarded as sufficient by itself to show that he intended to waive his right to the house as his separate property if he built it with his separate funds. Though the case on hand is a converse case, the site being purchased with self-acquired funds and the house having been built with joint family funds, the same principle would apply. It follows that clause (1) of the decree has to be modified so as to confine the declaration of the right of the plaintiffs to the 4/5th share only in respect of the house (superstructure) standing on the "A" schedule site.

9. There is one more aspect which needs to be dealt with in regard to A schedule property. As already stated, the lower Court granted a decree to the effect that the plaintiffs are entitled to get 4/ 5th share out of 1/6th share of the 1st defendant which he inherited from his father Satteyya Goud. This direction was given on the premise that the share in the undivided property inherited from the coparcenar remains to be the coparcenary property and therefore the plaintiffs can claim a share in that property as well. However, in view of the proviso to S. 6 read with S. 8 of the Hindu Succession Act as expounded by the Supreme Court in Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others, , it must be held that the undivided share in the property which D1 inherited from his father must be regarded as his separate property. In this view, clause (2) of the decree has to be deleted and accordingly I do so.

10. I will not take up "B" and "C" schedule items. It is the case of the plaintiff that a provision stores was started by the 1st defendant. It is statd: "with his ancestral nucleus the 1st defendant was running the provision stores, getting an income of about Rs.300/- per month." The 1st defendant constructed the "B" schedule building with the income derived from out of his business earnings. The 1st defendant states that he started the provision stores investing a small amount of Rs. 500/- which was the income derived from arrack business. He purchased the site in the year 1971 and he built the house and has been making improvements thereto with his own funds derived from kirana business. D1 further states that his late further did not contribute anything towards the purchase of the land or for the construction of the house. He denied that the kirana business was started out of the ancestral nucleus.

11. I shall now proceed to consider the evidence with regard to the provision stores run by the 1st defendant. In the chief examination, the plaintiff (P. W. 1) stated that her father-in-law used to do Kirana business and the shop was entrusted to her husband-D1. The kirana shop was being exclusively run by D1 and he alone was responsible for the loss and profits of the kirana business. She reiterated that the "B" schedule house was constructed with the income derived from the kirana shop. She stated in the cross-examination that the kirana business was started prior to her marriage i.e. in the year 1967 or so. She stated: "I do not know under what circumstances the said kirana shop was started." Later on she stated : "D2 to D4 are not having any rights in the B schedule property. B schedule is the self-acquired property of D1. Kirana stores also belongs to D1." Thus, apart from the categorical admission made by the plaintiff, the plaintiff did not say a word about the utilisation of ancestral funds for starting the kirana business. Nor could she explain the circumstances under which the business was started. Whereas in the plaint she stated that the provision stores was started by D1 with the ancestral funds, in the evidence, she contradicted herself by saying that her father-in-law late Satteiah started the kirana shop and he entrusted it to D1. Thus, apart from the apparent admission made by the plaintiff in her cross-examination, no iota of evidence has been placed by her to establish that D1 started the Kirana shop with ancestral funds

and that the joint family had a nucleus out of which the investment in the kirana business was made. It is settled law that there is no presumption that the business started by one of the members of the joint family belongs to the joint family and that it would enure to the benefit of the joint family. In order to prove the case that the business started by an individual member of the joint family is to be regarded as the joint family business meant for the benefit of all the members, there should be proof of relevant circumstances by the person who puts forward such claim, but he cannot take resort to any presumption. The principles in this regard have been succinctly summarised by the learned author Sri S. V. Gupte, in his treatise on Hindu Law (AIR Publication) (3rd Edition) at page 411:

"There is no presumption that a trade or business carried on by a member of a joint family by himself or in partnership with a stranger or strangers is joint family business. Such presumption does not arise even if that member is the manager of the family and it could make no difference in this respect that the manager is the father of the coparceners. Such a presumption would not arise even if there is some joint family nucleus unless it is found that the joint family property was actually utilised for starting or carrying on business or that the income arising from the business was thrown in the common stock."

The above passage is in fact based on the judgment of the Privy Council in *Bhuru Mal v. Jagannath*, AIR 1942 PC 13 which was reiterated in *G. Narayana Raju Vs. G. Chamaraju and Others*, . In the latter case, it was observed at page 1278:

"It is well established that there is no presumption under Hindu Law that business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family. Unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family or joint family funds or that the earnings of the business were blended with the joint family estate, the business remains free and separate. The question therefore, whether the business was begun or carried on with the assistance of joint family property or joint family funds or as a family business is a question of fact (See the decision of the Judicial Committee in *Bhuru Mal v. Jagannath*, AIR 1942 PC 13)".

12. Now coming back to the facts of the case, it is to be seen that the Kirana business was started, according to D.W. I in the year 1965. The evidence of P.W. I is more or less to the same effect. The existence of ancestral nucleus at that point of time is not established by any evidence worth mentioning. As already noticed, while discussing the first question regarding "A" schedule house, I have already held that the joint family of late Sattayya Goud and his sons were not possessed of any ancestral properties. There is no clear evidence to the effect that even the she-buffaloes which he was maintaining were inherited from or got on partition with his father. If so, it is difficult to draw an inference that the amount invested by the defendant for starting the kirana business was got out of joint family funds. No doubt, the first defendant has failed to give proper

explanation for the source of funds. In the written statement, he claimed to have got that money from the arrack business, but then, in the deposition, he clearly stated that he did not do any arrack business. But, the falsity of the defendant's plea cannot go to make out the case for the plaintiff. The plaintiff has to prove by positive evidence may be circumstantial, that there was ancestral nucleus or that the funds of the join) family were invested by DI and no presumption can be drawn in favour of the plaintiff. No such evidence in forthcoming in the instant case. The finding of the lower Court cannot therefore be sustained.

13. The lower Court has put forward a peculiar theory stating that notional rent of the portion of the house being occupied by the 1st defendant for running the kirana shop should be deemed to be the nucleus for the business. It is difficult to accept this view. The facility given by the members of the joint family to one of the members to start a business of his own in the joint family house, does not impress the business started by him with the character of joint family business. Thus the finding of the lower Court cannot at all be sustained in law; with the result the "C" schedule kirana store and business cannot be treated as joint family property. If so, the "B" schedule house constructed by defendant No. 1, admittedly by the earnings from the business cannot be treated as joint family property on the same reasoning.

14. In the result, the appeal is partly allowed. The judgment and decree of the lower Court are set aside except with regard to "A" schedule property in respect of which clause (1) of the decree will stand subject to the modification indicated above that is to say, clause (1) of the decree shall be confined only to the building constructed on "A" schedule site. The other clauses of the decree will stand superseded. In the circumstances, I make no order as to costs.

15. Appeal partly allowed.